114-564

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 1303.

PHILIP S. WALES, APPELLANT,

vs.

WILLIAM C. WHITNEY, SECRETARY OF THE NAVY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED APRIL 16, 1885.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 In the Supreme Court of the District of Columbia.

WASHINGTON, D. C., *April 8th*, 1885.

To the Honorable Walter S. Cox, Judge of the Supreme Court of the District of Columbia:

First. Your petitioner, Philip S. Wales, now comes and makes application to your honor for the allowance and issuance of a writ of *habeas corpus* directed to the Marshal of the District of Columbia, requiring the defendant William C. Whitney to bring before your honor your petitioner, and that your petitioner may be discharges from imprisonment and the illegal custody under which he is now restrained of his liberty, as hereinafter set forth.

Second. Your petitioner showeth that he is a citizen of the United States and a resident of the District of Columbia.

Third. That heretofore, to wit, upon the second day of March, 1885, at the District of Columbia aforesaid, your petitioner was, as hereinafter set forth, arrested and imprisoned, and ever since said arrest and imprisonment he has remained so in arrest [and] imprisonment and restrained of his liberty in said District, and is now, as he is advised and charges, under such arrest and restraint of his liberty illegally. That the alleged authority under which your petitioner is so imprisoned and restrained of his liberty is as follows:

Upon the 28th day of February, 1885, at the City of Washington, in the District of Columbia aforesaid, the then Secretary of the Navy of the United States, the Hon. William E. Chandler, issued and caused to be served upon your petitioner a pretended order, of which the following is a copy:

2 NAVY DEPARTMENT,
WASHINGTON, *February 28th*, 1885.

SIR: Transmitted herewith you will receive charges, with specifications, preferred against you by the Department.

A general court-martial has been ordered to convene in room-numbered 32 and 33, at the Navy Department, Washington, D. C., at 12 o'clock noon, on Monday, the 9th proximo, at which time and place you will appear and report yourself to Rear Admiral Edward Simpson, U. S. Navy, the presiding officer of the court, for trial. The judge advocate will summon such witnesses as you may require for your defence.

You are hereby placed under arrest, and you will confine yourself to the limits of the City of Washington.

Very respectfully, WM. E. CHANDLER,
Secretary of the Navy.

Medical Director Philip S. Wales, U. S. N., Washington, D. C.

3 Fourth. Your petitioner states that he herein sets forth, and makes part of this petition, a full, true, and perfect copy of the charges and specifications which are referred to in the said order of arrest, the said charges and specifications being hereto annexed and made and marked Exhibit A; and your petitioner states that the said order of arrest, and the arrest aforesaid, and imprison-

ment of your petitioner is based upon the alleged acts, matters and offenses set forth in the said charges and specifications, and upon none other whatsoever.

Fifth. Your petitioner further avers and represents that, as appears by the face of the said order of arrest and of the said charges and specifications referred to in the said order herein set forth, all the alleged acts and alleged offenses set forth in the said charges and specifications are acts exclusively pertaining to the office of "Chief of the Bureau of Medicine and Surgery in the Navy Department" of the Government of the United States, and said acts and matters set forth in the said charges and specifications, and which are set forth as constituting the alleged offenses of your petitioner, are not, nor is either of them, acts done under, in pursuance of, or within the purview or scope of, any other official authority whatever, except the said office of "Chief of the Bureau of Medicine and Surgery" of the Navy Department; and none of the said acts and alleged offences come within or pertain to the powers or duties of any officer or member of the Navy of the United States, as such; and neither of the said acts or offences come within the purview or provisions of the articles for the government of the Navy of the United States, or within the provisions or purview of either of them, or of any law of the United States or regulation for the government of such Navy.

4 Sixth. Your petitioner further represents that he is imprisoned, detained, and restrained of his liberty by, and is in the custody of the said William C. Whitney, who is a resident of and within the District of Columbia.

Seventh. Your petitioner further represents that he is so held in the custody of the said William C. Whitney, and so detained and restrained of his liberty in virtue of the alleged authority of the Secretary of Navy, by reason and in alleged exercise of the pretended and alleged authority to arrest, detain, imprison, try and convict your petitioner under the said articles of war, and before and by a court-martial, as set forth in the said order of arrest, and in virtue of no other alleged authority whatever; and said detention, arrest, and imprisonment are and were made, held, and continued under said color of authority of the United States.

Eighth. Your petitioner further avers and charges that the term of office of the said William E. Chandler, late Secretary of the Navy, and who issued the order aforesaid, expired and he ceased to hold the said office of Secretary of the Navy upon the 7th day of March, 1885, and that upon the same day the said William C. Whitney became the successor of the said William E. Chandler in the office of the Secretary of the Navy, and ever since has been, and now is, the Secretary of the Navy of the United States, duly appointed and commissioned, and is exercising the powers and functions of the said office; and ever since his introduction into the said office the said William C. Whitney has continued, as against your petitioner, the said unlawful detention, imprisonment, and restraint of your petitioner's liberty; and refuses to cancel the said order of arrest

5 and to discharge your petitioner from such imprisonment,

although requested by *t*our petitioner so to do; and now continues the said *said* detention, restraint, and imprisonment, under and in virtue of the said order of arrest.

Ninth. Your petitioner avers and charges that the said William E. Chandler was wholly without authority and jurisdiction to issue the said order, or to cause the said arrest and imprisonment, or to continue the same, and the said William E. Whitney is wholly without authority and jurisdiction to continue, as aforesaid, the said arrest and imprisonment; and the said court-martial, before which your petitioner is required to appear for trial, is wholly without jurisdiction to entertain or consider the said charges and specifications, and without jurisdiction to pronounce any judgment upon the same.

Wherefore your petitioner prays that he, by the order of your honor, may be discharged from said imprisonment.

PHILIP S. WALES.

DISTRICT OF COLUMBIA, *to wit:*

The petitioner, Philip S. Wales, being duly sworn according to law, says that he has read the foregoing petition and knows the contents thereof, and that the contents thereof, where stated of his own knowledge, are true, and, where stated upon information and belief, he believes them to be true.

PHILIP S. WALES.

Subscribed and sworn to before me this eighth day of April, A. D. 1885.

JNO. A. PRESCOTT,
Notary Public.

6 *Charges and Specifications of Charges Preferred by the Secretary of the Navy against Philip S. Wales, a Medical Director in the United States Navy.*

CHARGE I.—Culpable inefficiency in the performance of duty.

Specification 1st.

In this, that on the thirteenth day of December, eighteen hundred and seventy-nine, at the city of Washington, in the District of Columbia, the said Medical Director Philip S. Wales, then being a medical inspector in the United States Navy, and having, as such officer of the Navy, been duly appointed chief of the Bureau of Medicine and Surgery, with the title of surgeon general, in the Department of the Navy, and, as such chief, being then and there in charge of said bureau, and responsible for the proper and efficient administration of the same; and well knowing that the issuance of approved bills authorizing payments, from moneys of the United States, for articles purchased for the use of the United States under the direction of said bureau, and for expenses incurred in connection with the delivery thereof, was necessary to enable such payments to be made, and that it was a part of his duty, as such chief, to approve such bills and to exercise such care and diligence that all such bills

issued from said bureau should be for articles actually purchased and delivered for the use of the United States, under the direction of said bureau, to the value of the sums of money authorized in and by such bills to be paid from moneys of the United States, and that if the articles purporting, in and by any such bill, to have been so purchased and delivered had not, in fact, been so purchased and delivered, the issuance of such bill would be contrary to law, did, nevertheless, omit and fail, as chief of the said bureau, to exercise such care and diligence as aforesaid, and was therein and thereby culpably inefficient in the performance of his duty, by reason of which inefficiency on the part of the said Medical Director Philip S. Wales, as such chief of the bureau aforesaid, a certain paper, purporting to be an approved bill authorizing payment from moneys of the United States for articles therein described as having been purchased and delivered for the use of the United States, was, on or about the day and year aforesaid, issued from the said bureau, which paper was partly printed and partly written, and was in the words and figures following, that is to say:

[Form C-2.]

DECEMBER 13, 1870.

Navy Department, Bureau of Medicine and Surgery,

To James D. Cumming, Dr.

ARTICLE.	QUANTITY.	AMOUNT. Dols.	Cts.
For 1,000 feet best rubber-lined hose, 2½ in., with patent couplings		1,100	
One hose carriage, hand		200	
One steam force-pump, complete		410	
Packing, hauling, and transportation		32	22
		$1,742	22
For Naval Hospital, Mare Island, Cal., as per bureau order of June 10, 1879.			

The above account is correct, and approved Dec. 13, 1879, for seventeen hundred forty-two dollars and twenty-two cents, from repairs M. & S., 78–9.

PHILIP S. WALES,
Chief of Bureau.

Received —— dollars — cents, in full of above account.

——— ———.

When, in fact, the articles decribed in the paper abov e set forth had not been purchased for the use of the United States, and had

not been delivered, and the expenses for packing, hauling, and transportation therein mentioned had not been incurred, and when, in fact, the sum of seventeen hundred and forty-two dollars and twenty-two cents, purporting in and by said paper to be due and owing to James D. Cumming for the articles therein mentioned, and for packing, hauling, and transporting the same, and to be payable from moneys of the United States, was not, nor was any part thereof, due and owing from the United States to any persom whomsoever, by means of which false, fraudulent, and unlawful paper, and in consequence of the aforesaid culpable inefficiency of the said Medical Director Philip S. Wales, in the performance of his duty as chief of the bureau aforesaid, payment of the aforesaid sum of seventeen hundred and forty-two dollars and twenty-two cents, on said paper, was fraudulently obtained from the United States.

* * * * * * *

(Pages 7 to 66, inclusive, omitted by agreement of counsel.)

67 *Specification 63d.*

In this, that on the twenty-fifth of January, eighteen hundred and eighty-four, at the city of Washington, in the District of Columbia, the said Medical Director Philip S. Wales, being a medical officer in the United States Navy, and having, as such officer of the Navy, been duly appointed chief of the Bureau of Medicine and Surgery, with the title of surgeon general, in the Department of the Navy, and, as such chief, being then and there in charge of said bureau and responsible for the proper and efficient administration of the same; and well knowing that the issuance of approved bills authorizing payments from moneys of the United States, for articles purchased for the use of the United States under the direction of said bureau, was necessary to enable such payments to be made, and that it was a part of his duty as such chief to approve such bills and to exercise such care and diligence that all such bills issued from said bureau should be for articles actually purchased for the use of the United States, under direction of said bureau, to the value of the sums of money authorized in and by such bills to be paid from moneys of the United States, and that if the articles purporting in and by any such bill to have been so purchased had not in fact been so purchased, the issuance of such bill would be contrary to law, did, nevertheless, omit and fail, as chief of the said bureau, to exercise such care and diligence as aforesaid, and was therein and thereby culpably inefficient in the performance of his duty, by reason of which inefficiency on the part of the said Medical Director Philip S. Wales, as such chief of the bureau aforesaid, a certain paper, purporting to be an approved bill authorizing payment from moneys of the United States for articles therein described as having been purchased for the use of the United States, was on or about the day and year aforesaid, issued from the said bureau, which paper was partly printed and partly written, and was in the words and figures following, that is to say:

[Form C 4.]

Navy Department, Bureau of Medicine and Surgery, JAN. 25, 1884.

To Jones & Webster, Dr.

	Article.	Amount.
For 6 canvas covers for	general operating cases, @ $3	18
8 " " "	expeditionary and boat cases, @ $2.75	22
6 " " "	boat medicine chests, @ $4.25	25 50
12 " " "	dental cases, @ $2.25	27
6 " " "	test cases, @ $2.70	16 20
3 swinging cots, @ 11.50		34 50
50 mattress covers, @ $1		50
For the Medical Dep't of the Navy.		$193 20

BUREAU OF MEDICINE AND SURGERY, NAVY DEPARTMENT, *Jan. 25, 1884.*

The public exigencies required the immediate delivery of the articles mentioned in this bill, and they were therefore obtained by open purchase, and the same is approved for the sum of one hundred ninety-three dollars and twenty cents, from Medical Dep't, M. & S., 83–4.

PHILIP S. WALES,
Chief of Bureau.

NAVY PAY OFFICE, ———,
Received of Pay ———, U. S. Navy, —— dollars and —— cents, ———, 188 .
in full of the above account, and have signed duplicate receipts.
8—. ——.

when, in fact, the articles described in the paper above set forth had not been purchased for the use of the United States, and when, in fact, the sum of one hundred and ninety-three dollars and twenty cents, purporting in and by said paper to be due and owing to Jones & Webster for swinging cots, mattress covers, and other articles, and to be payable from moneys of the United States, was not, nor was any par- thereof, due and owing from the United States to any person whomsoever, by means of which false, fraudulent, and unlawful paper, and in consequence of the aforesaid culpable inefficiency of the said Medical Director Philip S. Wales in the performance of his duty as chief of the bureau aforesaid, payment of the aforesaid sum of one hundred and ninety-three dollars and twenty cents on said paper was fraudulently obtained from the United States.

said ...
tioner's liberty, ...
5 and to discharge your petitioner ...

69 CHARGE II.—Neglect of duty.

Specification.

In this, that the said Medical Director *Philip S. Wales*, then being a medical inspector in the United States Navy, and having, as such officer of the Navy, been duly appointed Chief of the Bureau of Medicine and Surgery, with the title of Surgeon General, in the Department of the Navy, and having, as such chief, to wit: at the city of Washington, in the District of Columbia, on the twentieth day of August, eighteen hundred and seventy-nine, assumed the charge of said bureau, with the duties, responsibilities, and powers thereunto lawfully appertaining; and well knowing that it was his duty, as chief of said bureau, to exercise diligent and careful supervision over the business thereof, and to see that the same was properly transacted, and that all papers, records, books, and accounts connected therewith were properly preserved and kept, and that it was also his duty, as such chief, diligently and carefully to supervise, direct, and control all persons officially employed in the transaction of the business of said bureau, while so employed, in order to secure the diligent and faithful discharge of their respective duties by such employés, and to devote so much of his time as was reasonably necessary and sufficient for the proper performance of his duties as chief of the bureau aforesaid; and well knowing, also, that it was a part of his duty, as such chief, to approve and issue all bills authorizing payments from moneys of the United States, for articles purchased for the use of the United States, under the direction of said bureau, and, before approving and issuing such bills, carefully to examine and scrutinize the same, together with the official records, returns, and books of account, in said bureau, relating to the purchase of articles for such use and to payments for articles so purchased, and to ascertain whether there were or were not moneys of the United States lawfully available for the payments purporting to be authorized by such bills; and well knowing, also, that by means of such examination and scrutiny he would be enabled to ascertain whether the purchase of the articles mentioned and described in such bills had or had not been duly authorized, and whether there were or were not moneys of the United States lawfully available for such payments; and well knowing, also, that he would, by such examination and scrutiny, be enabled to ascertain and determine whether bills purporting to be for purchases regularly and properly authorized, and purporting to be regularly submitted for his approval, as chief of the bureau aforesaid, were or were not true and lawful bills; did, nevertheless, between the tenth day of March, eighteen hundred and eighty-two, and the twenty-sixth day of January, eighteen hundred and eighty-four, while in charge of said bureau, in disregard of the official obligations assumed by him and of the official responsibilities attaching to him, as such chief, neglect and fail to diligently and carefully supervise the business of said bureau, and to see that such business was properly transacted, and that all papers, records, books, and accounts connected therewith were properly preserved

and kept; and did further neglect and fail to diligently and carefully supervise, direct, and control all persons officially employed in the transaction of the business of said bureau, while so employed, and did further neglect and fail to devote so much of his time as was reasonably necessary and sufficient for the proper performance of his duties as chief of the bureau aforesaid; and did also neglect and fail to examine and scrutinize, as he should have done, bills submitted for his approval and purporting to authorize payments for articles lawfully purchased for the use of the United States under the direction of said bureau, and did further neglect and fail to examine and scrutinize the officiul records, returns, and books of account, in said bureau, relating to the purchase of articles for such use, and to payments for articles so purchased, and did further neglect and fail to ascertain whether there were or were not moneys of the United States lawfully available for such payments, and did further neglect and fail to ascertain by such examination and scrutiny, as he might and should have done, whether the purchase of the articles purporting, in and by such bills, to have been purchased for the use of the United States, had or had not been regularly and properly authorized, and whether there were or were not moneys of the United States lawfully available for such payments, and whether such bills were true and lawful bills: By reason whereof, and in consequence of such several neglects and failures, as aforesaid, on the part of the said Medical Director Philip S. Wales, as chief of the bureau aforesaid, and while he was in charge thereof, as aforesaid, the business of said bureau was not properly transacted; the papers, records, books, and accounts connected therewith were not properly preserved and kept; persons officially employed therein and subject to his supervision and control, as aforesaid, were not diligent and faithful, but were negligent, irregular, and unfaithful in the discharge of their duties; false and fraudulent bills, purporting to be true and lawful bills, and to authorize lawful payments from moneys of the United States for articles regularly and properly purchased for the use of the United States, were issued, and payments of such moneys were fraudulently obtained upon such bills, when, in fact, the purchase of the articles described in such bills for such use had not been regularly and properly authorized, and when, in fact, such articles had not been purchased for such use; all this to the great scandal, disgrace, and injury of the service, and to the loss and damage of the United States to a large amount, to wit, to the amount of fifty thousand dollars and upwards.

WM. E. CHANDLER,
Secretary of the Navy.

NAVY DEPARTMENT,
Washington, D. C., February 24th, 1885.

70 In the Supreme Court of the District of Columbia, April 9th, 1885.

Ex parte PHILIP S. WALES.

Order on Petition for Habeas Corpus.

Let the writ issue, returnable on Saturday at 10 o'clock a. m.

W. S. COX, *Judge.*

April 9th, 1885.

Cause Certified to General Term.

The questions presented in this proceeding are respectively certified to the General Term, to be heard there in the first instance.

W. S. COX, *J.*

April 9th, 1885.

71 DISTRICT OF COLUMBIA, *to wit:*

The President of the United States to William C. Whitney, Secretary of the Navy, Greeting:

You are hereby commanded to have the body of Philip S. Wales, detained under your custody, as it is said, together with the day and cause of his being taken and detained, by whatever name he may be called in the same, before the Hon. Walter S. Cox, one of the justices of the supreme court of the said District, at ten o'clock a. m. Saturday, April 11, 1885, immediately after the receipt of this writ, to do and receive whatever shall then and there be considered of in this behalf; and have then there this writ.

Witness, D. K. Cartter, chief justice, the 9th day of April, 1885.

R. J. MEIGS, *Clerk,*
By W. E. WILLIAMS,
Assistant Clerk.

Marshal's Return.

Served the within writ by leaving a copy in the hands of said William C. Whitney, Secretary of the Navy, this 9th day of April, 1885.

CLAYTON McMICHAEL, *Marshal.*

72 To the Honorable Walter S. Cox, one of the justices of the supreme court of the District of Columbia:

William C. Whitney, Secretary of the Navy, makes return to the annexed writ as follows:

The said Philip S. Wales is now and has been since the 15th of October, 1881, a medical director, and from the 30th of June, 1873, until said 15th of October, 1881, a medical inspector in the United States Navy. He was appointed Chief of the Bureau of Medicine and Surgery in the Navy Department, with the title of surgeon general and with the relative rank of commodore, on the 20th of August,

and kept; and did further neglect and fail to diligently and carefully supervise, direct, and control all persons officially employed in the transaction of the business of said bureau, while so employed, and did further neglect and fail to devote so much of his time as was reasonably necessary and sufficient for the proper performance of his duties as chief of the bureau aforesaid; and did also neglect and fail to examine and scrutinize, as he should have done, bills submitted for his approval and purporting to authorize payments for articles lawfully purchased for the use of the United States under the direction of said bureau, and did further neglect and fail to examine and scrutinize the officiul records, returns, and books of account, in said bureau, relating to the purchase of articles for such use, and to payments for articles so purchased, and did further neglect and fail to ascertain whether there were or were not moneys of the United States lawfully available for such payments, and did further neglect and fail to ascertain by such examination and scrutiny, as he might and should have done, whether the purchase of the articles purporting, in and by such bills, to have been purchased for the use of the United States, had or had not been regularly and properly authorized, and whether there were or were not moneys of the United States lawfully available for such payments, and whether such bills were true and lawful bills: By reason whereof, and in consequence of such several neglects and failures, as aforesaid, on the part of the said Medical Director Philip S. Wales, as chief of the bureau aforesaid, and while he was in charge thereof, as aforesaid, the business of said bureau was not properly transacted; the papers, records, books, and accounts connected therewith were not properly preserved and kept; persons officially employed therein and subject to his supervision and control, as aforesaid, were not diligent and faithful, but were negligent, irregular, and unfaithful in the discharge of their duties; false and fraudulent bills, purporting to be true and lawful bills, and to authorize lawful payments from moneys of the United States for articles regularly and properly purchased for the use of the United States, were issued, and payments of such moneys were fraudulently obtained upon such bills, when, in fact, the purchase of the articles described in such bills for such use had not been regularly and properly authorized, and when, in fact, such articles had not been purchased for such use; all this to the great scandal, disgrace, and injury of the service, and to the loss and damage of the United States to a large amount, to wit, to the amount of fifty thousand dollars and upwards.

WM. E. CHANDLER,
Secretary of the Navy.

NAVY DEPARTMENT,
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Witness, D. K. Cartter, chief justice, the 9th day of April, 1885.

R. J. MEIGS, *Clerk,*
By W. E. WILLIAMS,
Assistant Clerk.

Marshal's Return.

Served the within writ by leaving a copy in the hands of said William C. Whitney, Secretary of the Navy, this 9th day of April, 1885.

CLAYTON McMICHAEL, *Marshal.*

72 To the Honorable Walter S. Cox, one of the justices of the supreme court of the District of Columbia:

William C. Whitney, Secretary of the Navy, makes return to the annexed writ as follows:

The said Philip S. Wales is now and has been since the 15th of October, 1881, a medical director, and from the 30th of June, 1873, until said 15th of October, 1881, a medical inspector in the United States Navy. He was appointed Chief of the Bureau of Medicine and Surgery in the Navy Department, with the title of surgeon general and with the relative rank of commodore, on the 20th of August,

1879, by the President, and on the 26th of January, 1880, he received a similar appointment from the President by and with the advice and consent of the Senate. From the 20th of August, 1879, to the 26th of January, 1884, the termination of the latter commission, the said Philip S. Wales received pay at the rate of $5,000 per annum, that being the highest pay of the grade of commodore. This rate of pay was greater than the highest rate for either medical inspector or medical director.

On the 24th of February, 1885, Hon. William E. Chandler, then Secretary of the Navy, preferred charges and specifications of charges against the said Philip S. Wales, medical director, copy of which is hereto attached and marked Exhibit A, and the same is made part of this return. On the 2d of March, 1885, the said Secretary of the Navy served upon the said Philip S. Wales, medical director, at Washington, D. C., a copy of the said specifications, together with an order, copy of which is hereto attached and marked Exhibit B, and the same is made part of this return. And on the 24th of February, 1885, a precept was issued convening a general court-martial, copy of which is hereto attached and marked Exhibit C, and the same is made part of this return.

73 In obedience to the order, copy of which is marked Exhibit B, the said Philip S. Wales did appear before said general court-martial at the time and place therein named, and reported himself to Rear Admiral Edward Simpson, United States Navy, the presiding officer of the court, for trial. The said Philip S. Wales then and there, in reply to a question of the judge advocate, stated that he had received a copy of the charges and specifications and a list of the witnesses for the prosecution; and he then and there requested consideration by the court of an application previously made by him to the convening power for an adjournment of a month or more, which application had been referred to the court for its recommendation. Thereupon such proceedings were had that the following communication from your respondent was read in open court, after which the court-martial adjourned until Tuesday, April 14th, 1885:

NAVY DEPARTMENT,
WASHINGTON, *March 9th*, 1885.

SIR: The department is in receipt of your reply to its letter of this date upon the subject of the postponement of the trial of Medical Director Philip S. Wales, United States Navy.

The recommendation of the court that the accused be granted until Tuesday, April 14th, 1885, to prepare his case, and that the court be empowered to adjourn until that date, is approved, and the court will be adjourned accordingly.

You will please direct the members of the court and the judge advocate to return to their respective homes or stations, and to return and resume their present duties on the day fixed for the reassembling of the court.

Very respectfully,

W. C. WHITNEY,
Secretary of the Navy.

Rear-Admiral Edward Simpson, U. S. N.,
President Court-Martial, Navy Department.

74 No challenges had been made, the members of the court had not been sworn, and the accused was not arraigned.

Your respondent respectfully submits that the said Philip S. Wales is not now, nor was at the time of issuing the annexed writ, in the custody or possession of, or confined or restrained of his liberty by, your respondent, other than as appears by the papers marked A, B, and C, attached hereto and made part of this return, and that the cause of such detention, if any there be, is fully shown in said exhibits.

And your respondent further answers that neither he nor any one by his authority has exercised any physical restraint over the said Philip S. Wales before or since the issue of said writ.

Your respondent further answers that by virtue of his office as Secretary of the Navy the said Philip S. Wales, being a medical director in the Navy, was at the time of the issuing of the said writ, and has since continually been, in the power of your respondent so far as the statutes of the United States and the regulations of the Navy, not inconsistent therewith, have vested him with authority over the said Philip S. Wales.

Your respondent further says that he knows of no obstacle or impediment to prevent the said Philip S. Wales from being present before your honor at the time and place fixed in the said writ; but, in order to comply with the order of your honor and under and by virtue of his authority as Secretary of the Navy, he has ordered the said Philip S. Wales to be present at the time and place so fixed. Wherefore the said William C. Whitney, Secretary of the Navy, has here, before your honorable court, the body of the said Philip S. Wales, together with the said writ, as therein he is commanded.

W. C. WHITNEY,
Secretary of the Navy.

75 EXHIBIT C.

(Copy.)

NAVY DEPARTMENT,
WASHINGTON, *February 24th*, 1885.

To Rear Admiral Edward Simpson, U. S. Navy, Navy Department, Washington, D. C.:

A general court-martial is hereby ordered to convene in room numbered 32 and 33, at the Navy Department, Washington, D. C., at twelve o'clock noon, on Monday, the ninth day of March, eighteen hundred and eighty-five, or as soon thereafter as practicable, for the trial of Medical Director Philip S. Wales, United States Navy, and of such other persons as may be legally brought before it.

The court is to be composed of the following members, any five of whom are empowered to act, viz:

Rear-Admiral Edward Simpson, U. S. Navy; Commodore Stephen B. Luce, U. S. Navy; Commodore Alexander A. Semmes, U. S. Navy; Commodore Jonathan Young, U. S. Navy; Captain D. L. Braine, U. S. Navy; Captain Aaron W. Weaver, U. S. Navy; Captain William

P. McCann, U. S. Navy; Medical Director James Suddards, U. S. Navy; Medical Director Edward Shippen, U. S. Navy; Medical Director John M. Browne, U. S. Navy; Medical Director John Y. Taylor, U. S. Navy; Pay Director James Fulton, U. S. Navy; Pay Director Edward May, U. S. Navy; and of Lieutenant Samuel C. Lemly, U. S. Navy, as judge advocate. No other officers can be detailed without manifest injury to the service.

This employment on shore duty is required by the public interests, and such service will continue until June 30, 1885, unless it is otherwise ordered.

WM. E. CHANDLER,
Secretary of the Navy.

76 In the Supreme Court of the District of Columbia.

Ex parte PHILIP S. WALES.

And now comes the petitioner by counsel, and demurs to the return made by the Honorable William C. Whitney, Secretary of the Navy, to writ of *habeas corpus* issued herein. And for grounds of demurrer says that the said return is insufficient in law.

SHELLEBARGER & WILSON,
F. P. B. SANDS,
Of Counsel for Petitioner.

77 In the Matter of the Writ of *Habeas Corpus* commanding the Secretary of the Navy, William C. Whitney, to produce the body of Philip S. Wales.

The respondent, William C. Whitney, having made return to said writ, prays the court that said writ be discharged.

JNO. S. BLAIR,
Att'y for Respondent.

78 In the Supreme Court of the District of Columbia.

Ex parte PHILIP S. WALES, Petition for *Habeas Corpus.*

This cause coming on to be heard on the petition of Philip S. Wales, and upon the return of Hon. William C. Whitney, Secretary of the Navy, to the writ of *habeas corpus* issued therein, and upon the demurrer filed by the petitioner to said return, and upon the motion of respondent for discharge of the writ upon his return filed in the cause. It is this 11th day of April, A. D. 1885, ordered that the same be, and it is hereby, certified to the court in general term to be there heard in the first instant.

W. S. COX, *J.*

79 *Order. Gen'l Term.*

Habeas Corpus. Ex relatione PHILIP S. WALES.—No. 15780.

This cause coming on for hearing, and having been argued by counsel and duly considered, it is, this 14th day of April, 1885, ordered and adjudged that the petition be dismissed with costs, the

court being of opinion that the relator has not been, nor is he at this present, deprived of his personal liberty by virtue of the orders of the Secretary of the Navy set out in the petition.

By the Court: A. WYLIE.

80 *Allowance of Appeal.*

In the Supreme Court of the District of Columbia, in General Term.

In the Matter of PHILIP S. WALES, Petition for Writ of *Habeas Corpus.*—No. 15780.

On motion of the petitioner an appeal is hereby, this 15th day of April, A. D. 1885, allowed by the Supreme Court of the United States from the order of this court passed herein on the 14th day of April, A. D. 1885.

By the Court: A. WYLIE.

81 DISTRICT OF COLUMBIA, *to wit:*

To the Secretary of the Navy (William C. Whitney):

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to appeal allowed and and filed in the clerk's office of the supreme court of the District of Columbia, wherein Philip S. Wales is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness D. K. Cartter, chief justice of the said supreme court of the District of Columbia.

Service acknowledged this 15th day of April, 1885.

WM. C. WHITNEY,
Secretary of the Navy.

82 In the Supreme Court of District of Columbia, the 16th day April, 1885.

In the Matter of PHILIP S. WALES, Petition for Writ of *Habeas Corpus.*—No. 15780. Appeal.

Know all men by these presents, that we, Philip S. Wales, Thomas A. Tolson, are bound unto Return J. Meigs, clerk of the supreme court of District of Columbia, in the sum of one hundred dollars, to be paid to the said Return J. Meigs, clerk, &c., his executors or administrators. To which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 16th day of April, 1885.

Whereas the above-named Philip S. Wales has prosecuted his appeal to the Supreme Court of the United States to reverse the decree or order rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named Philip S. Wales shall prosecute his said appeal to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

PHILIP S. WALES. [SEAL.]
T. A. TOLSON. [SEAL.]

Sealed and delivered in presence of—
F. P. B. SANDS.

Approved 16 April, 1885.

CHARLES P. JAMES, *Justice.*

83 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court, this 16th day of April, 1885.

{ Seal of Supreme Court of the District of Columbia. }

R. J. MEIGS, *Clerk,*
By R. J. MEIGS, JR.,
Assistant Clerk.

Justice's Certificate.

I, David K. Cartter, chief justice of said court, do certify the foregoing attestation by R. J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal, this 16 day of April, 1885.

D. K. CARTTER, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, R. J. Meigs, clerk of said court, hereby certify that David K. Cartter, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court, this 16th day of April, 1885.

{ Seal of Supreme Court of the District of Columbia. }

R. J. MEIGS, *Clerk,*
By R. J. MEIGS, JR.,
Assistant Clerk.

Endorsed on cover: District of Columbia supreme court. No. 1303. Philip S. Wales, appellant, *vs.* William C. Whitney, Secretary of the Navy. Filed April 16, 1885.

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PHILIP S. WALES. [SEAL.]
T. A. TOLSON. [SEAL.]

Sealed and delivered in presence of—
F. P. B. SANDS.

Approved 16 April, 1885.

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PHILIP S. WALES. [SEAL.]
T. A. TOLSON. [SEAL.]

Sealed and delivered in presence of—
F. P. B. SANDS.

Approved 16 April, 1885.

CHARLES P. JAMES, *Justice.*

AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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Witness my hand and the seal of said court, this 16th day of April, 1885.

(Seal of Supreme Court of the District of Columbia.)

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By R. J. MEIGS, JR.,
Assistant Clerk.

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Chief Justice.

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JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States

Ex parte PHILIP S. WALES, on Habeas Corpus.

On Appeal from the Supreme Court of the District of Columbia.

BRIEF FOR RELATOR,

BY

SHELLABARGER & WILSON and
F. P. B. SANDS.

THOMAS McGILL & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

Ex parte PHILIP S. WALES.

Petition for Writ of Habeas Corpus.

Appeal from the Supreme Court of the District of Columbia.

STATEMENT OF FACTS.

The following facts appear in the record:

I.

Philip S. Wales, the petitioner, was a medical director in the Navy of the United States, and while holding that office was, on the 20th day of August, A. D. 1879, nominated by the President and confirmed by the Senate to the office of Chief of the Bureau of Medicine and Surgery for a term of four years, and was duly commissioned to the last-named office, which office he held until the 26th day of January, 1884.

II.

William E. Chandler, then Secretary of the Navy, on the 28th day of February, 1885, issued the following order:

NAVY DEPARTMENT,
WASHINGTON, *February 28th*, 1885.

SIR: Transmitted herewith you will receive charges,

with specifications, preferred against you by the Department.

A general court-martial has been ordered to convene in rooms numbered 32 and 33, at the Navy Department, Washington, D. C., at 12 o'clock noon, on Monday, the 9th proximo, at which time and place you will appear and report yourself to Rear Admiral Edward Simpson, United States Navy, the presiding officer of the court, for trial. The Judge Advocate will summon such witnesses as you may require for your defense.

You are hereby placed under arrest, and you will confine yourself to the limits of the city of Washington.

Very respectfully,
(Signed) WM. E. CHANDLER,
Secretary of the Navy.

Reported March 9th, 1885.
(Signed) E. SIMPSON,
Rear Admiral U. S. N., and President of the Court.

Medical Director PHILIP S. WALES, U. S. N.,
Washington, D. C.

This order was served on the said Philip S. Wales on the 2d day of March, 1885, and is still in operation.

III.

The charges and specifications referred to in said order were served on the petitioner, Dr. Wales, along with this order.

IV.

The charges are for violating the ninth subdivision of article 8 of the Regulations for the Government of the Navy. (Rev. Stats., sec. 1624.)

Which regulation, so far as it specially relates to this case, is as follows:

"Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy; * * * ninth, or [who] is negligent or careless in obeying orders, or culpably inefficient in the performance of duty."

V.

The first charge is "culpable inefficiency in the performance of duty."

Under this charge there are sixty-three specifications, (all except the first and last are omitted, by agreement, in printing,) in each of which it is distinctly averred that the petitioner "had been *duly appointed Chief of the Bureau of Medicine and Surgery* * * * *in the Department of the Navy;*" that "as such chief, being then and there in charge of said bureau, and responsible for the proper and efficient *administration of the same*, * * * it was a part of his duty, as such chief, to approve such bills and to exercise such care and diligence that all such bills, issued from the said bureau, should be for articles actually purchased * * * under the direction of said bureau;" * * * that he did "omit and fail *as chief of the said bureau* to exercise such care and diligence as aforesaid, and was therein and thereby culpably inefficient in the performance of his duty," &c.

VI.

Charge 2 is for neglect of duty.

There is one specification under this charge, and it avers in substance, as stated in paragraph 5 above, to wit, that "as chief of said bureau" he failed to exercise diligent and careful supervision over the business thereof and to see that the same was properly transacted;" and throughout said specification it is distinctly averred that all the acts or conduct or negligence complained of had relation solely to the administration of the said office of Chief of the Bureau of Medicine and Surgery.

VII.

On the 9th of April, 1885, Dr. Wales filed his petition for a writ of habeas corpus in the Supreme Court of the

District of Columbia, averring, in substance, that he had been arrested pursuant to the order above set forth; that he continued to be restrained of his liberty under such arrest up to the 7th day of March, 1885, when Secretary Chandler was succeeded in his office by the Hon. William C. Whitney, and that such arrest has continued under the said Secretary Whitney up to the date of the filing of the petition; that he had demanded of the said Whitney to be discharged from said restraint, which demand had been refused; that the charges and specifications which accompanied the said order of arrest, and on account of which he was held to appear before a court-martial for trial, were for alleged offenses growing out of and having relation solely to the administration of the office of Chief of the Bureau of Medicine and Surgery, and not on account of any acts or offenses within the purview or provisions of the articles for the government of the Navy of the United States, or of any law of the United States or regulation for the government of such Navy.

VIII.

On this petition a writ was issued on the 9th day of April, and on the 11th a return was made by the said William C. Whitney, the said Secretary of the Navy, in substance that the petitioner was appointed Chief of the Bureau of Medicine and Surgery on the 26th day of January, 1880, and continued in office until the 26th day of January, 1884; that the charges and specifications made and exhibited to the petition were preferred against him; that the order above referred to was issued; that a court-martial was convened; that the petitioner was not in the possession or custody of, or confined or constrained of, his liberty by the respondent, other than as appears by the specifications and orders above alluded to; and states that the respondent, nor any one by his authority, has exercised

any *physical* restraint over the petitioner before or since the issue of the writ.

IX.

To this return there was a demurrer by the petitioner, which was overruled, and a motion by the respondent was made to discharge the writ, which was sustained.

ASSIGNMENT OF ERRORS.

FIRST. The court erred in overruling the demurrer.

SECOND. The court erred in sustaining respondent's motion to discharge the writ.

THIRD. The court erred in not discharging the defendant from custody.

BRIEF.

By this record two questions are presented for the consideration of this court:

FIRST. Whether there was such a restraint of liberty as would justify or warrant the issuance of a writ of *habeas corpus*.

SECOND. Whether, it appearing by the face of the record that the matters and things complained of, and on account of which the arrest was made and the party was restrained, that they related solely to the discharge of the duties of the office of Chief of the Bureau of Medicine and Surgery, and not to duties pertaining to an officer of the Navy, the petitioner could be held to answer for any such alleged dereliction of duty before a naval court-martial.

These two questions will be considered in their order.

FIRST. As to restraint, we submit the following propositions and considerations:

District of Columbia, averring, in substance, that he had been arrested pursuant to the order above set forth; that he continued to be restrained of his liberty under such arrest up to the 7th day of March, 1885, when Secretary Chandler was succeeded in his office by the Hon. William C. Whitney, and that such arrest has continued under the said Secretary Whitney up to the date of the filing of the petition; that he had demanded of the said Whitney to be discharged from said restraint, which demand had been refused; that the charges and specifications which accompanied the said order of arrest, and on account of which he was held to appear before a court-martial for trial, were for alleged offenses growing out of and having relation solely to the administration of the office of Chief of the Bureau of Medicine and Surgery, and not on account of any acts or offenses within the purview or provisions of the articles for the government of the Navy of the United States, or of any law of the United States or regulation for the government of such Navy.

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FIRST. As to restraint, we submit the following propositions and considerations:

As an appendix to this brief, we print the opinions of Mr. Justice James and Mr. Justice Wylie, given in disposing of this case, from which it will be seen that in the court below the case was disposed of solely upon the ground that there was no such restraint as would justify a resort to the writ of *habeas corpus*.

Mr. Justice James in his opinion says:

"Here we have an order which simply informs the party that he will confine himself to the limits of the city of Washington. As a matter of fact, he can go where he pleases. His liberty is not restrained, except as he chooses to restrain himself, rather than meet the consequences of disobeying this order. If he is confined to the city of Washington, he confines himself. He is told that he is to do so. And that, we think, disposes of the whole question. Dr. Wales is not under restraint, except so far as he chooses to obey a military order. He can disobey it at any moment, and leave the District as freely as any person in this District may do so, but with the liability, however, of answering for it. He prefers to stay rather than incur the possible penalties of disobedience in leaving the District. In short, it is shown by his own petition that he is not under that kind of restraint from which the writ of *habeas corpus* will deliver a person. *That writ contemplates actual physical restraint.*"

Mr. Justice Wylie in his opinion says:

"The presence of physical force is necessary. The appearance of physical force to restrain a man of liberty is necessary to constitute the imprisonment. Mere moral force is not sufficient for the purpose. In the present case the consequence of violating this order by Dr. Wales under the articles of war relating to the Navy is that he would lose his office. He can go where he chooses, but he will lose his office. That is what it comes down to. That is a moral influence. It is not the presence of a physical force."

We have stated this much of these opinions for the purpose of showing the ground upon which in the court below

it was held that the writ should be dismissed and the petitioner denied its benefits.

The question, therefore, is whether or not the issuance of the order referred to, which distinctly and in terms states, "You are hereby placed under arrest, and will confine yourself to the limits of the city of Washington," with the possible, and even most probable, consequences of losing his office as medical inspector in the event of a disobeyance of that order, is a restraint of liberty within the meaning of those words as used in the statute, or whether a party, before he can avail himself of such a writ, must have attending him such a presence of force as restrains his movements, or, in other words, whether he must be so actually menaced by force, actually and physically present, as controls his movements against his will.

Or, to state it otherwise, whether a naval officer having such an order issued and served upon him must rest under it and must take the peril of deciding for himself whether the order of arrest is or is not illegal, with the not remote contingency that the disobeyance of it, even if in point of law it was actually illegal, would be his dismissal from his office and his consequent disgrace, being thus constrained and thus restrained, is without redress by and through the writ of *habeas corpus*.

On this point we submit the following:

FIRST. The act authorizing the issuance of the writ of *habeas corpus* declares the purpose of the writ to be "an inquiry into the cause of restraint of liberty."

See Rev. Stats., 752.

"Every restraint upon a man's liberty is, in the eye of the law, an imprisonment, *wherever* may be the place or whatever may be the *manner* in which the restraint is effected."

1 Kent, 631.
Hurd on Hab. Cor., 210.
1 Hilliard on Torts, 193.

"Words may constitute an imprisonment if they impose a restraint upon the person, and he be accordingly restrained, and submits."

Hurd on Hab. Cor., 210.
Homer *v.* Baltyn, Buller's N. P., 62.
Pike *v.* Hanson, 9 N. H., 491.

"If an illegal act be done under color of legal authority or process from an officer who had no jurisdiction of the subject-matter, or whose order or process is made or issued in violation of the law, the judge or justice and party procuring it are trespassers; so is the officer and all who act under him, if the process is void on the face of it (10 Coke, 76); and his who procures such order on false pretenses is the most aggravated case. It is not necessary to constitute false imprisonment that the person restrained of his liberty should be touched or actually arrested—if he is ordered to *do* or *not to do* the thing, to *move* or *not* to move against his own *free will;* if it is not left to his own option to go or stay where he pleases, and force is offered or threatened and the means of coercion are at hand ready to be used, *or there is reasonable ground to apprehend that coercive means will be used if he does not yield.* A person so threatened, need not wait for its actual application. His submission to threatened and *reasonably to be apprehended force* is no consent to the arrest, detention, or restraint of the freedom of his motion. He is as much imprisoned as if his person was touched or force actually used. The imprisonment continues until he is left at his own will to go where he pleases, and must be considered as involuntary till all efforts at coercion or restraint cease and the *means of effecting it are removed.*"

Johnson *v.* Tompkins *et al.*, Baldwin C. C. Rep., p. 603.

In this case the officer is expressly placed in arrest, and ordered to confine himself within a specified limited locality, and the power of the United States is always at hand to enforce it.

By operation of law this deprives him of even the limited liberty of an officer of the Navy.

He is forbidden to visit the Navy Department.
Navy Regulations, sec. 25, p. 83.

"No officer under arrest, suspension, or furlough will leave the State or Territory of which he is a resident, *or visit the Navy Department*, without the authority of the Secretary of the Navy."

Sec. 157, p. 33, of "ORDERS, REGULATIONS, AND INSTRUCTIONS FOR THE ADMINISTRATION OF LAW AND JUSTICE IN THE NAVY," provides:

"The custody of a prisoner belongs to his immediate commanding officer as a part of his command, and neither a court-martial nor its judge advocate has any authority over the person of a prisoner except when he is actually before the court for trial or as a witness."

In this case the Secretary is his immediate commanding officer.

If the point is made by the defendant that there is no restraint or imprisonment here, on the ground that if the order of arrest is illegal, then, being so illegal and void, the prisoner is in no legal sense restrained, because in that case he can go where he pleases, the answer to this is that, being held under *alleged color of right or authority*, the law does not bind the prisoner to take the responsibility of violating the order on the ground that it is illegal, and the writ of *habeas corpus* is granted, amongst other reasons, for the very purpose of delivering the prisoner from the danger of taking the responsibility himself of deciding that his arrest is illegal. This position is enforced and illustrated in various ways:

(A) Take the class of cases arising under the acts of Parliament making it a felony for a prisoner to break away from imprisonment. Under statutes of this kind it is held that whether the imprisonment was one in fact or only one in law, then alike, and equally, in such

cases of breaking away from imprisonment, the crime was committed, the prisoner not being allowed to decide for himself, in breaking away, the question whether his imprisonment was legal or not, it being one under *color of lawful authority.*

2 Coke's Institute, 589.

(B) Or, take the case of a minor enlisted in the Army or Navy of the United States in violation of the statute prohibiting the enlistment of minors in the Army or Navy without the consent of the parent. In every such case it might be said that the enlisted minor could take the responsibility of leaving the Army or Navy—walking off at his leisure—taking the chances for being shot for desertion, because he could not be shot, owing to his enlistment being void. The writ of *habeas corpus* is made in a large measure to relieve the citizen from the decision of the question of his illegal imprisonment, and requiring that to be decided by the courts. That a soldier illegally enlisted may be discharged on *habeas corpus*, will hardly be questioned, and is decided in such cases as McLave's case, 8 *Blatchford*, 67 to 72. Besides this, the writ of *habeas corpus* does not depend upon the certainty or uncertainty of the illegality of the arrest. For example, the State Courts are not permitted as against a Federal custody to issue the writ of *habeas corpus* and to discharge. (See Tarbell's case, 13 Wall., 397.) And such State Courts being so excluded, they are equally excluded from issuing the writ to deliver from Federal custody, although the Federal custody is clearly and unquestionably illegal. This is carefully considered and expressly decided in the last-cited case. (See the language of Judge Field on pages 410, 411, where the court says there is no difference for the purposes of this writ between color of Federal authority and clear and conclusive authority.)

(C) The same consideration just stated shows that such

imprisonment as the relator is subjected to is within the remedy of the writ of *habeas corpus*. It is said that Dr. Wales, not being under actual physical custody, and being only confined to the City of Washington by the force of an order which we allege to be illegal, is not imprisoned. In other words, the point seems to be that since he is not in actual physical restraint, and since his petition states that the only restraint is that contained in an illegal order, that therefore he is not imprisoned, because—

FIRST. Actual physical restraint is absent; and

SECOND. There is no restraint except one under color of authority, but which authority is illegal and void.

Now, precisely the same argument and reasons apply to the case of a soldier. The soldier who is entitled to the writ need be under no physical restraint. He is at large, with all the powers of locomotion which pertain to soldiers. There is no physical restraint which prevents him from leaving the Army and going home and taking the chances. So, also, in the case of a soldier if his enlistment is absolutely void. It may be said that he is in no danger of liability for desertion, he not being a member of the Army, because his enlistment was so void. Yet, as we have above shown, *habeas corpus* is a remedy to which he may resort, and thus deliver him from the Army and also from the dangers of incurring liability for desertion in case he took the law in his own hands; decided that his enlistment was illegal, and went home.

But it is said that the prisoner is not imprisoned, because he is not in actual physical restraint, and because, moreover, this order of arrest and confining him to the city is not accompanied or supported by the presence of such physical power, authority, or force as compels restraint of liberty; that hence this order of the Secretary is mere

brutum fulmen—is like an order from a private citizen to the prisoner, ordering him to be in arrest and remain within the District, such order being backed by no display of physical force.

This contention is certainly without the slightest foundation.

It may be well conceded that there is no imprisonment where there is nothing but an order, written or verbal, restraining the prisoner, and where there is no reasonable apprehension that physical force will be used to enforce the order if disobeyed, such order being without color of lawful authority; but that, we submit, is a case in its legal qualities totally distinct and radically different from the case at bar.

The case at bar presents a case where the order is backed up by the presence of physical power absolutely irresistible, and, besides, is an order made under color of lawful authority.

On this point, it must in the first place be observed that this element of color of authority completely distinguishes the present order from an order to the prisoner proceeding from a private citizen without color of authority.

In Tarbel's case (13 Wall., 410) a contention was set up alleging that the cases of Ablemon *v.* Booth and The United States *v.* Booth (21 Howard, 506, &c.) were cases holding that the State courts could not by *habeas corpus* disturb a Federal custody where the rightfulness of the Federal custody was undisputedly lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But the court rejected this contention, and made even color of Federal authority to exclude the jurisdiction of the State courts.

This, therefore, is a decision that the presence of color of authority in making the arrest is an element in making out the act of imprisonment.

Then, again, as we have said, there is in the present case,

back of and accompanying this order of arrest, the presence of overwhelming physical force, such force being the entire naval and military force of the United States, and this force not only to be reasonably apprehended by Dr. Wales, but a force which the laws command and make it imperative to be employed for enforcing his confinement to the prison limits. Section 118 of the "Orders, Regulations, and Instructions for the Administration of Law and Justice in the Navy" (p. 25) commands him to confine himself to the limits assigned him, either at the time of his arrest or afterwards, *under pain of being dismissed from the service*, and prohibits him from visiting any superior officer.

Then, in addition to this, there is furnished to the President and all officers of the Army and Navy under him the use of the Army and Navy for the purpose of enforcing obedience to this alleged lawful imprisonment.

We have already presented an illustration under another head, and for the purpose of another point—the case of the enlistment of a minor in the naval service whose discharge from the Army by *habeas corpus* must be admitted to be obtainable.

Suppose such minor to be ordered by his superior officer not to depart from the city; is it to be contended in this case that he is not imprisoned because, in his case, there is not present, backing up such order, such physical force as justifies a reasonable apprehension that, should he depart the city, physical force would be employed and was present to enforce his detention? That cannot be contended, and, besides, has been decided in scores of cases.

Now, the case of the prisoner is precisely the same, in that there is the same physical force present to enforce his imprisonment as is present in the case of the minor just considered.

From the foregoing authorities and regulations we insist that the petitioner is restrained of his liberty.

Is the Restraint Unlawful?

The next question is, is that restraint unlawful?—which is the substance of our second question above.

As to this, we submit the following propositions, with reference to which we will cite the statutes relating thereto.

First. The charges and specifications show that he is under arrest and held to answer before a court-martial for alleged neglect of duty whilst in the *discharge of the duties of the office of the Chief of the Bureau of Medicine and Surgery*, and not on any other account whatever.

This involves an examination into the character of this office of chief of this bureau and of the functions of the Navy Department, of which this bureau is a part.

By the Constitution the Government is divided between the Legislative, Executive, and Judicial Departments.

Section 415 of the Revised Statutes provides that there shall be "an executive department, to be known as the Department of the Navy."

Section 419 (Revised Statutes):

"The *business of the Department of the Navy* shall be distributed in such manner as the Secretary of the Navy shall judge to be expedient and proper amongst the following bureaus:"

* * * * * * *

"Eighth. A Bureau of Medicine and Surgery."

The heads of these several bureaus are provided for in section 421, which says:

"The chiefs of the several bureaus *in the Department of the Navy* shall be appointed by the President, by and with the advice and consent of the Senate, from the classes of officers mentioned in the next five sections, respectively, or from officers having the relative rank of captain in the staff corps of the Navy on the active list, and shall hold their offices for the term of four years."

Section 426 provides that "the Chief of the Bureau of Medicine and Surgery shall be appointed from the list of the surgeons of the Navy."

Section 1471 provides that "the Chief of the Bureau of Medicine and Surgery * * * shall have the relative rank of commodore whilst holding said position, and shall have * * * the title of Surgeon-General."

Section 418 provides that "the Secretary of the Navy shall have the *custody* and *charge of all* the books, records, and other property now remaining in and appertaining to the Department of the Navy, or hereafter acquired by it;" and section 420 provides that "the several bureaus shall retain charge and custody of the books of records and accounts pertaining to their respective duties; and *all the duties* of the *bureaus* shall be performed *under the authority of the Secretary of the Navy*, and *their orders shall be considered as emanating from him*, and *shall have full force and effect as such.*"

Thus we see that an *executive* department, with its *bureaus* or offices and its particular duties, are created by law, (separate and apart from the naval service proper,) with its officers designated and appointed in a particular manner, with limited terms of service in their respective offices.

We see in the establishment of the bureau system, as a part of the organization of the Navy Department, that the duties to be performed by the heads of the several bureaus are the duties of the Secretary of the Navy distributed amongst them to insure the more thorough and perfect *supervision* of the various interests, needs, and requirements of the Department of the Navy, the orders of the bureaus being, in contemplation of law, the orders of the Secretary himself in the administration of the affairs of his Department.

The chiefs of these several bureaus are simply *officers of the Department*—aids of the Secretary in the discharge of his administrative duties. There is no such *office* in the

Navy proper as "the chief of a bureau." No such office appears in the act organizing the Navy.

Officers of the Navy *as such* hold their commissions on a *life tenure;* whereas the heads of the bureaus hold their offices for the limited period of four years; upon the expiration of which term of office they return to the *duties* and positions they may hold in the Navy.

The duties of chief of a bureau in the Department of the Navy, as so prescribed by the statutes, are manifestly such only as pertain to the administration of *such* of the *executive duties* of the said Department as have been assigned to his particular bureau in the distribution of the *business of the executive department*, made under the authority of section 419 by the Secretary of the Navy.

These duties are performed, moreover, not by virtue of any *assignment to duty* according to his rank in the Navy, but by *virtue* of his *appointment* to that *administrative office*, under an independent commission, for a brief and limited term, (2 Op. Attorneys-General, 503.) which can only be abridged by his voluntary resignation of the office, or by the act of the President of the United States removing him by a nomination of his successor, with its confirmation by and with the advice and consent of the Senate.

These statutory provisions creating the office in question demonstrate that the duties that were being discharged, and which are referred to in the specifications, were duties appertaining to a civil office, to be performed by a civil officer, and not duties of a naval officer as such.

No one would pretend that the position of the Secretary of the Navy is other than a *civil office*. The Chief of the Bureau of Medicine and Surgery is a *civil* subordinate of this *civil* officer; or, if not that, he is an independent officer in this *civil* establishment; and it is inconceivable that such a *position* could be regarded as other than *civil* in its character.

These statutory provisions show that the Chief of the

Bureau of Medicine and Surgery discharges the functions of his office, not in virtue of his being an officer of the Navy, nor *as* an officer of the Navy, but through the authority of his separate and independent office, established by express law, to which he has been commissioned under an appointment by the President and confirmation by the Senate for a prescribed term.

This office, so created by law, is separate and distinct from the naval service proper. Its duties are wholly independent of and distinct from the duties of a naval officer. And the fact that the chief of the bureau holds a commission in the Navy, has no relation to this bureau office, except in so much that the law expressly made him eligible for it upon attaining a designated grade in the service.

2 Opinions, *supra*.

We maintain that no officer of the Navy can be *detailed* to perform the duties of chief of a bureau in the Navy Department, the nearest approach to this being found in the *possibilities* provided for under section 178 of the Revised Statutes, under which the surgeon who has been detailed to act as assistant to the chief of the bureau is designated as the individual who, in the contingency mentioned therein, is to temporarily perform the duties of the office, these duties, it is clear, being devolved upon him, *not* by reason of any *orders* from the Secretary to perform them, but by virtue of the express authority conferred by that section of the statutes.

We mention this to show how absolutely the duties of the naval officer are separated by the law from those of the chief of the bureau, the duties of the former being *military* and of the latter purely *civil*.

This is made much more conspicuous by considering the duties that appertain to a surgeon in the Navy and the different duties to be performed by the Chief of the Bureau of Medicine and Surgery.

The title or designation of "*surgeon*" scarcely needs a definition to indicate the nature of the duties belonging to such officer.

The duties of the Chief of the Bureau of Medicine and Surgery are specifically defined as follows by the General Order of the Secretary of the Navy, No. 293, of March 30th, 1882:

"It shall furnish all the supplies, medicines, and instruments required in the Medical Department of the Navy.

"It shall have the *sole control* of all *buildings erected* for its purposes.

"It shall determine upon and furnish all the stores, stationery, blank books, and forms used in the Medical and *Hospital Departments*, materials, instruments, means, and appliances of every kind used for its purposes; and shall have under its sole control their inspection, storing, transportation, and preparation.

"It shall design, erect, furnish, and maintain all the buildings constructed for its purposes outside the limits of the navy yards, and for which it may have estimated; and it shall, subject to the provisions of law, be charged with the purchase, sale, and transfer of all land and buildings in connection therewith, and with the preservation of the public property under its control.

"It *shall design the various buildings erected within navy yards for its purposes, so far only as their* INTERNAL ARRANGEMENTS are concerned, and, after their completion, *shall have exclusive control of the same;* but the *construction and repairing* of these buildings shall not be done by the Bureau of Medicine and Surgery, nor shall the cost thereof be defrayed by it.

"It *shall have under its sole control the pay, organization, and mustering of the labor of all kinds connected with it and used entirely for its purposes.*

"It *shall make all contracts for and superintend all the work* done under it.

"All *reports, surveys, applications for discharge of invalids*, pay-rolls, and communications relating to its duties shall be addressed to and received from it.

"It *shall estimate for, and pay from its own funds*, the cost necessary to carry out the duties as above defined."

By an examination of the designated duties of the Surgeon-General above quoted it will be seen that there are devolved upon him duties which are in their nature so essentially *civil* and so widely separated from the professional duties of the surgeon or medical officer of the Navy that the simple perusal of them leads to the conclusion that the duties of the "Chief of the Bureau of Medicine and Surgery" are purely *administrative* and *civil*, and that they are not such as are involved in the *naval duties* of the officer.

A forcible illustration of our proposition is to be found in the provisions of the law regarding the discharge of these very duties.

No one will for an instant maintain that the clerks of the *Navy Department* are *in the naval service*, or subject to the laws and regulations for its better government! They are simply and only a part of the administrative machinery of the Department necessary for the transaction of its *business*.

We find it provided, however, in section 178 of the Revised Statutes, that in the contingency mentioned therein, the *chief clerk* of the bureau—a clerk appointed by the Secretary under the authority of the statute for certain clerical duties—is designated and empowered to enter upon and fulfill the duties of the Chief of the Bureau of Medicine and Surgery. It would not be pretended that for his acts as chief of the bureau he was amenable to trial by court-martial!

This brings us to the consideration of the grounds upon which we claim that this restraint was and is illegal, to wit:

The petitioner being an officer in the Navy Department, holding an office separate and distinct from the Navy, the duties of which are essentially civil and not military, he is not responsible to military law for the manner in which he performs such duties, and his arrest and detention for

trial before a court-martial on charges relating to such duties is without authority of law.

Courts-martial are created for the sole purpose of trying offenses against military law. We submit that it is plain that there can be no military offenses except such as may be created, defined, by act of Congress.

FIRST. The Constitution, section 8, article 1, provides that Congress shall have power "to provide and maintain a Navy," "to make rules for the Government and regulation of the land and naval forces."

And there is no power elsewhere than in Congress to make such rules and regulations; and therefore it is absolutely plain that there can be no rule or regulation except such as Congress has made or provided for, and certainly no offenses except such as Congress has defined. No secretary can make an act an offense, nor can any court do so.

Now, with the power to legislate thereon as above recited, Congress has gone into that field of its power, and by its enactments has defined what shall be deemed and considered offenses; and only such acts as are expressly *defined as offenses* by its enactments are to be deemed such.

We now invite attention to what has been enacted by Congress into offenses cognizable by a court-martial.

Section 1624 of the Revised Statutes provides:

"The Navy of the United States shall be governed by the following articles."

Then follows a list of offenses plainly confined and limited in their reference to the officers and men of the naval service in connection with their strictly naval duties and obligations as such, and among them is the provision under which the charges and specifications in this case are presented, to wit:

"ART. 8. Such punishment as a court-martial shall adjudge may be inflicted on any person in the Navy." * * *

"NINTH. Or is negligent or careless in obeying orders, or culpably *inefficient* in the *performance of duty*."

This is the provision under which these charges are preferred.

Our contention is that this inefficiency in the performance of duty refers alone to duty as an officer of the Navy, and cannot be strained to embrace within its provisions such duties as the accused was required to perform in connection with another and distinct office to which he had been appointed, and which has no relation to his position as an officer of the Navy, save only that being a naval officer made him eligible to the *civil* office named.

And when that ninth section of article 8 of said act is read in connection with the remaining sections of said article, the correctness of our position is made manifest, both as to the line of duties that are made the subject-matter of its provisions and as to the official character of those who are punishable for a breach of any of its provisions. It is clear, beyond question, that they are only applicable to persons on strictly naval service and duty, and that the duties involved in these charges are not embraced therein. This, it seems to us, cannot be seriously controverted.

This division between civil and criminal offenses is carefully preserved in the Constitution by the provisions of article 5 of the amendments, as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the *land or naval forces* or in the militia when in actual service in time of war or public danger."

This provision of the Constitution marks and makes supremely important the dividing line between offenses relating to matters of civil as distinguished from matters of military cognizance.

In the first place, it establishes the fact that there are such two distinct and severed classes of offenses.

Again, it attaches to the civil class that supremely important protection which is found in requiring presentment or indictment by grand jury as a prerequisite to any person being required to answer.

The courts in every English-speaking country, whether in our States or in our Federal courts or in England, have steadily guarded this division of the two classes, so as to limit the class punishable by military courts without indictment most scrupulously and strictly to offenses "arising in the land and naval forces"—this in obedience to the principles of civil liberty and the precepts of *Magna Charta*, from which said provision of the Constitution is derived.

This tendency and quality of our law is perhaps nowhere more powerfully illustrated and enforced than in *Ex-parte* Milligan, 4 Wall., 2.

Again, it will be observed that this Fifth Amendment is not only peremptory, but precise and explicit in excluding ~~all crimes~~ from the class not requiring indictment every possible offense of which it cannot be predicated that it is one "arising in the land or naval forces or in the militia," &c. Hence, unless the duties of the head of a bureau in the Navy Department are duties arising in the land or naval forces or in the militia, then clearly and expressly offenses committed in discharge of such executive duties cannot, even by express act of Congress, be made punishable by court-martial, or otherwise than "on presentment or indictment of a grand jury."

This consideration, as applied to the interpretation of the Articles for the Government of the Navy, under which the prisoner is arrested, shows that they could not have been meant to cover offenses committed in the exercise of executive duties as distinguished from duties arising in the land or naval forces; and it moreover shows that had the Articles for the Government of the Navy been meant to cover

such distinct executive duties, and to authorize a trial by court-martial for the negligent discharge thereof, then such act would be void, as prohibited by the Fifth Amendment.

Now, keeping in mind that these charges are preferred for a violation of one of the provisions of the rules governing the *Navy*, which means the "*naval forces*," and not the Navy *Department*, if we are right in our contention that the duties referred to are duties of a civil office, to be performed by a civil officer, then the conclusion must follow that to hold the petitioner under these charges for trial before a court-martial is an illegal restraint. And the only remaining question, if it is a question, is, as to the right and duty of the court below to have discharged him from such restraint.

Under the provision of the article under which the charges are preferred, the punishment is to be "such as the court-martial may adjudge."

This may be imprisonment; and if such punishment were adjudged, the court-martial being without jurisdiction, the civil court would discharge the prisoner therefrom.

If the court would discharge in such a case, then certainly it would discharge when, before trial, the party being under arrest, it appeared that the court was without jurisdiction to try the case. In support of this we cite—

Ex-parte Bollman *v.* Swartwout, 4 Cranch, 75.
Ex-parte Lange, 18 Wall, 163.
Ex-parte Siebold, 100 U. S., 371.
Ex-parte Virginia, 100 U. S., 339.
Wise *v.* Withers, 3 Cranch, 333.

We therefore ask that the judgment of the court below be reversed, and that the prisoner be discharged from custody.

SHELLABARGER & WILSON.
F. P. B. SANDS.

APPENDIX.

IN RE WALES.

Petition for Writ of Habeas Corpus.

Mr. JUSTICE JAMES. The Secretary of the Navy issued to Dr. Wales the following communication and order:

"WASHINGTON, *February 28th*, 1883.

"SIR: Transmitted herewith you will receive charges, with specifications, preferred against you by the Department.

"A general court-martial has been ordered to convene in rooms numbered 32 and 33, at the Navy Department, Washington, D. C., at 12 o'clock noon, on Monday, the 9th proximo, at which time and place you will appear and report yourself to Rear Admiral Edward Simpson, United States Navy, the presiding officer of the court, for trial. The Judge Advocate will summon such witnesses as you may require for your defense.

"You are hereby placed under arrest, and you will confine yourself to the limits of the city of Washington.

"Very respectfully,

"(Signed) WM. E. CHANDLER,

"*Secretary of the Navy.*"

To that petition the Secretary of the Navy made return, in which he states that your respondent respectfully submits that the said Philip S. Wales is not now, nor was at the time of issuing the annexed writ, in the custody or possession of, or confined or restrained of his liberty by, your respondent, other than appears by the papers marked A, B, and C attached hereto and made a part of this return, and that the cause of such detention, if any there be, is fully shown in said exhibits.

In other words, it appears that the restraint, which is characterized as a restraint of liberty, in this case was exercised by this order which I have just read.

The first question that presents itself is whether the petitioner is under restraint—that kind of restraint from which the writ of *habeas corpus* is intended to deliver the party. I have not at hand the book that was read to us the other day, but, in the first place, the question would occur, What is meant by the statement "you are placed under arrest?" The regulations show that that is a military phrase, and that it does not import what we know as confinement—*close* confinement. The order itself, however, without the assistance of the explanation which may be drawn from the regulations, defines precisely the character of the restraint. It is, that the arrest consists in confining himself in his movements to the city of Washington. Authorities were cited to us to the effect that words could constitute an imprisonment, but nothing of that kind was decided by those cases. It was not there held that words constituted a confinement or deprivation of liberty. The cases were of this kind—I need not refer to them specifically—that where an officer having power to make an actual physical arrest presented himself to the person, and told him you are arrested, then these words imported that the officer took possession of him. The words constituted no arrest or deprivation of liberty, but they were simply proof of the nature of the officer's presence. His presence and demeanor were explained by the words he uttered, and his presence and demeanor had the effect to deprive the party of his liberty. Words have no effect of themselves.

Here we have an order that simply informs the party that he will confine himself to the limits of the city of Washington. As a matter of fact, he can go where he pleases. His liberty is not restrained, except as he chooses to restrain himself, rather than meet the consequences of disobeying this order. If he is confined to the city of Washington, he confines himself. He is told that he is to do so. And that, we think, disposes of the whole question. Dr. Wales is not under restraint, except so far as he chooses to obey a military order. He can disobey it at any moment, and leave the District as freely as any person in this District may do so, but with the liability, however, of answering for it. He prefers to stay, rather than incur the possible penalties of disobedience in leaving the District. In short, it is shown by his own petition that he is not under that kind of restraint from which the writ of habeas corpus will

deliver a person. That writ contemplates actual physical restraint.

With this view, we have not thought it proper to examine into the validity of the order by which he alleges that he is restrained of his liberty. Where the petitioner is deprived of his liberty, the court may examine incidentally the question whether the order, the enforcement of which restrains him, is valid. But unless we have a deprivation of liberty of the kind to which the writ of *habeas corpus* applies, we are not at liberty to examine an order that does not deprive him of his liberty. Our power to look into that subject is incidental to the inquiry into the lawfulness of his imprisonment. If we find no imprisonment, we cannot examine; we have no authority to examine the validity of the order. For that reason we give no opinion upon that subject.

There is another very good reason why we should not. If by possibility he should be deprived actually of his liberty, and imprisoned under the sentence of the court-martial referred to, this court could be called upon again to look into that question; and it is not proper, as we think, for us to intimate any conclusions whatever on that subject.

Mr. JUSTICE WYLIE. I wish to say a word.

The writ of *habeas corpus* will only lie for the purpose of restoring to liberty a man who is unjustly imprisoned; and I suppose the proposition cannot be denied that unless an action for false imprisonment, prosecution for false imprisonment, an action for false imprisonment would lie against the party who has done the act in question, the writ of *habeas corpus* will not lie in behalf of the person who is subjected to the proceedings. Now it is clear, I think, that no action for false imprisonment would lie on behalf of Dr. Wales against the Secretary of the Navy for this order. If he could not maintain an action for false imprisonment, then he has not been imprisoned in such way as would give him the benefit of a writ of *habeas corpus* On that subject I will read one line or two from Selwyn's Nisi Prius, p. 915:

"False imprisonment is a restraint on the liberty of the person without lawful cause, either by confinement in prison, in stocks, house, &c., or even by forcibly detaining the party in the streets against his will. For this injury an action of trespass *vi et armis* will lie, usually termed an action for false imprisonment."

In a note to that case is a reference to the opinion of Judge Baldwin—the case of Johnson *v.* Tompkins, reported in Baldwin's Reports, p. 601—which appears to me bears the true distinction in this case:

"It is not necessary to constitute false imprisonment that the person restrained of his liberty should be touched or actually arrested, if he is ordered to do or not to do the thing, to move or not to move against his own free will; if it is not left to his own option to go or stay where he pleases, and force is offered or threatened and the means of coercion are at hand ready to be used, or there is reasonable ground to apprehend that coercive means will be used if he does not yield. A person so threatened need not wait for its actual application. His submission to threatened and reasonably-to-be-apprehended force is no consent to the arrest, detention, or restraint of the freedom of his motion. He is as much imprisoned as if his person was touched or force actually used. The imprisonment continues until he is left at his own will to go where he pleases, and must be considered as involuntary till all efforts at coercion or restraint cease and the means of effecting it are removed."

The presence of physical force is necessary. The appearance of physical force to restrain a man of liberty is necessary to constitute the imprisonment. Mere moral force is not sufficient for the purpose.

In the present case the consequence of violating this order by Dr. Wales under the Articles of War relating to the Navy is that he would lose his office. He can go where he chooses, but he will lose his office. That is what it comes down to. That is a moral influence. It is not the presence of a physical force.

I have my doubts upon the other point as to the power of a court-martial to try a man for negligence in the performance of his duties in connection with the bureau of the Department, though I do not wish to commit myself upon that subject.

Mr. JUSTICE JAMES. I might have added to the opinion that in the view of the court the Secretary of the Navy would have been obliged for the first time to take possession of him to produce his body here.

Mr. JUSTICE WYLIE. The Secretary of the Navy never had possession of him.

Mr. JUSTICE JAMES. If my brother Wylie concurs, we will dismiss the writ, overrule the demurrer, and make it final.

Mr. JUSTICE WYLIE. That will be effectual.

Mr. JUSTICE WYLIE. The Secretary of the Navy never had possession of him.

Mr. JUSTICE JAMES. If my brother Wylie concurs, we will dismiss the writ, overrule the demurrer, and make it final.

Mr. JUSTICE WYLIE. That will be effectual.

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In the Supreme Court of the United States.

OCTOBER TERM, 1884.

No 1303

EX PARTE PHILIP S. WALES.

BRIEF FOR RESPONDENT.

In the Supreme Court of the United States.

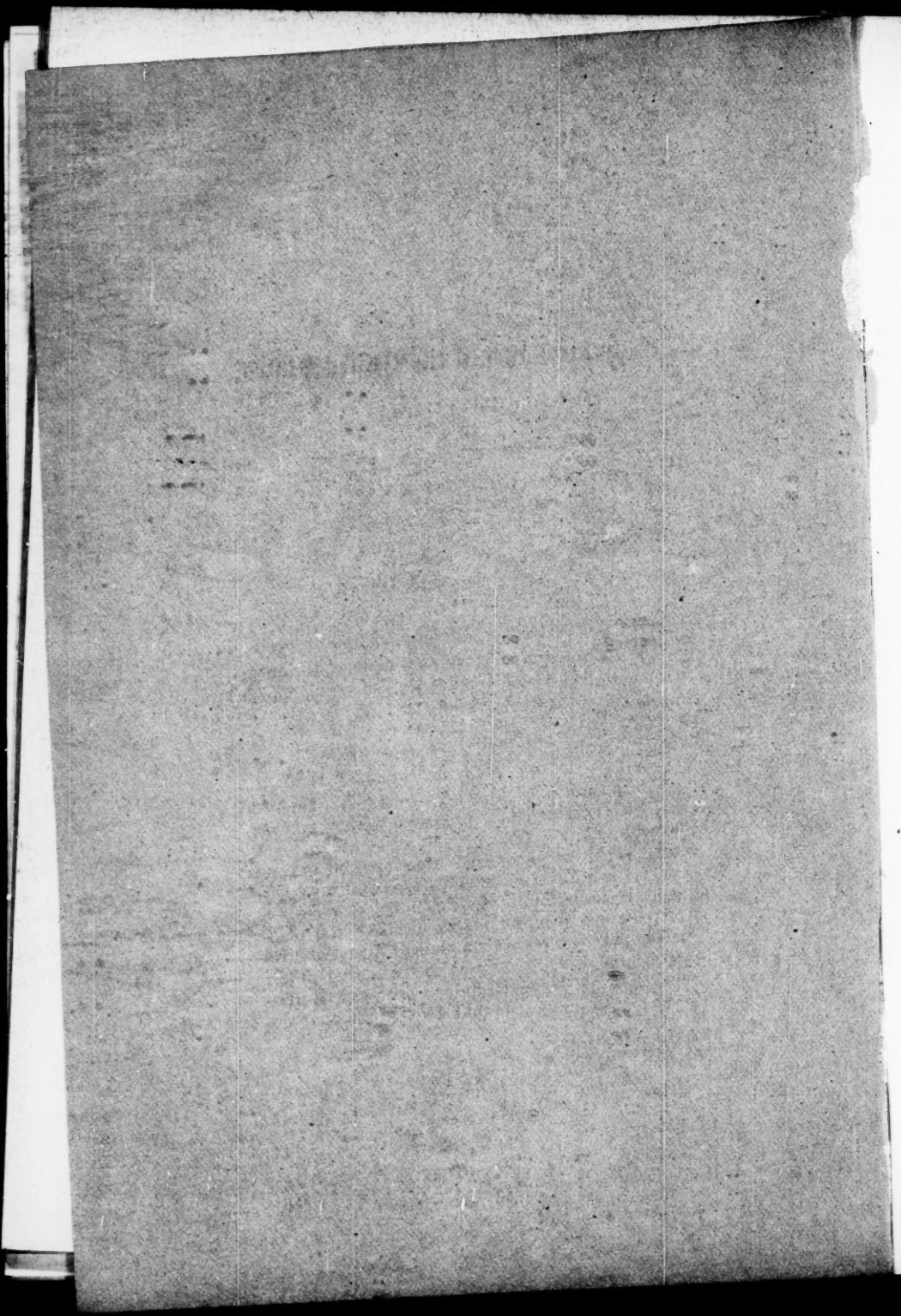
OCTOBER TERM, 1884.

EX PARTE PHILIP S. WALES.

BRIEF FOR RESPONDENT.

While the petition of Dr. Wales contains numerous general allegations of imprisonment and confinement, the only distinct statement of fact is that the Secretary of the Navy sent to him the following letter:

> NAVY DEPARTMENT,
> *Washington, February 28, 1885.*
>
> SIR: Transmitted herewith you will receive charges, with specifications, preferred against you by the Department.
>
> A general court-martial has been ordered to convene in rooms numbered 32 and 33, at the Navy Department, Washington, D. C., at 12 o'clock noon, on Monday, the 9th proximo, at which time and place you will appear and report yourself to Rear-Admiral Edward Simpson, U. S. Navy, the presiding officer of the court, for trial. The judge advocate will summon such witnesses as you may require for your defense.



In the Supreme Court of the United States.

OCTOBER TERM, 1884.

EX PARTE PHILIP S. WALES.

BRIEF FOR RESPONDENT.

While the petition of Dr. Wales contains numerous general allegations of imprisonment and confinement, the only distinct statement of fact is that the Secretary of the Navy sent to him the following letter:

> NAVY DEPARTMENT,
> *Washington, February* 28, 1885.
>
> SIR: Transmitted herewith you will receive charges, with specifications, preferred against you by the Department.
>
> A general court-martial has been ordered to convene in rooms numbered 32 and 33, at the Navy Department, Washington, D. C., at 12 o'clock noon, on Monday, the 9th proximo, at which time and place you will appear and report yourself to Rear-Admiral Edward Simpson, U. S. Navy, the presiding officer of the court, for trial. The judge advocate will summon such witnesses as you may require for your defense.

You are hereby placed under arrest, and you will confine yourself to the limits of the city of Washington.

Very respectfully,

WM. E. CHANDLER,
Secretary of the Navy.

Medical Director PHILIP S. WALES, U. S. N.,
Washington, D. C.

Sections 118 and 119 of the regulations for the administration of law and justice in the United States Navy, adopted by the Secretary of the Navy April 15, 1870, are as follows:

> SEC. 118. Every officer shall, when arrested, deliver up his sword when required to do so by the authority of his commanding officer, and shall confine himself to the limits assigned him either at the time of his arrest or afterward, under pain of being dismissed from the service. An officer under arrest will not visit officially his commanding or other superior officer, unless sent for, and in case of business he will make known his object in writing.
>
> SEC. 119. No officer placed under suspension or arrest shall be confined to his room, or restrained from the proper use of any part of the vessel to which before his suspension or arrest he had a right, except the quarter-deck and poop, unless such confinement or restraint shall be necessary for the safety of the ship, or the preservation of good order and discipline, and even then neither the confinement nor the additional restraint shall be imposed for any longer time than shall be absolutely necessary.

The petition contained no allegation of physical restraint, and accordingly the Secretary of the Navy, when he filed his return to the writ, moved the court below to dismiss the writ. This motion was granted by the court.

I.

It is contended by the respondent that where the petition contains no allegation of physical restraint, and where that fact cannot be deduced from the facts set forth, the writ of *habeas corpus* should not issue. (Church on Habeas Corpus, 84; Dodge's case, 6 Martin (La.), 569; Kansas *vs.* Cutter, McCahon, 152; Opinions of Wylie and James, J. J., in appendix hereto; Ex parte Royall, 112 U. S., 181.)

II.

It is further contended by the respondent that the order to Dr. Wales to confine himself to the city of Washington is legal, and one from which he cannot be relieved by the court. The letter in question is directed to Philip S. Wales, Medical Director, United States Navy, and is signed by the Secretary of the Navy.

The only confinement complained of is legal, entirely irrespective of its purpose and of the reasons which prompted the Secretary to issue it.

The writ of habeas corpus directed the Secretary of the Navy to produce the body of Philip S. Wales *with the reasons* for his detention. An order to Dr. Wales to remain in the city of Washington and an order to go to New York and remain there or return are manifestly within the discretion committed by law to the head of the Navy Department; and it is well settled that the courts will not inquire into the wisdom with which that discretion has been exercised.

The restraint in this case is no greater and no more severe than is constantly being exerted by the Secretary of

the Navy over all officers in the service. It would be subversive of all discipline if an officer ordered to remain at any station or at any post might, after inquiring the reasons therefor, obtain a mandate from the supreme court of the District of Columbia to the Secretary to disclose those reasons. The simple fact is Dr. Wales is ordered to remain in Washington, and the reason is, he is required to attend and answer charges. With the reason I respectfully submit the court has nothing to do. An order of the Secretary directed to a third party, commanding him to take the body of Philip S. Wales and him safely keep, &c., would not be within the general powers of the Secretary, and would only be justified by certain circumstances. In such a case the court might, with all propriety, issue the writ of habeas corpus and inquire why he was thus detained, in order to ascertain the existence of those circumstances.

The applicant is in this dilemma: If this order is illegal he is under no obligation whatever to obey it, and if he disobeys, in any punitive proceeding he can demonstrate its illegality; if, on the other hand, the order is legal and exercises any restraint whatever the writ should not have issued.

III.

The rules for the government of the Navy provide as follows (section 1624, Rev. Stat.):

> The Navy of the United States shall be governed by the following articles:
>
> * * * * *
>
> ART. 8. Such punishment as a court-martial may adjudge may be inflicted on any person in the Navy.
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> * * * * *

Ninth. Or [who] is negligent or careless in obeying orders, or culpably inefficient in the performance of duty.

* * * * *

ART. 22. All offenses committed by persons belonging to the Navy which are not specified in the foregoing articles shall be punished as a court-martial may direct.

Dr. Wales having been an officer in the Navy of the United States at the time of the alleged offenses, and being still an officer, there can be no doubt that the court-martial has jurisdiction of his person. He contends that jurisdiction of the offense is wanting, because the duties which it is charged he was culpably inefficient to perform were duties assumed by him as Surgeon-General, and laid aside when his incumbency of that office ceased, and that the Surgeon-General, Chief of the Bureau of Medicine and Surgery in the Navy Department, is a civil officer.

A naval or military officer detailed or ordered to perform duties civil in their nature is liable to trial by court-martial for neglect or failure to perform those duties (see Runkle *vs.* United States, 19 C. Cl., 396, pp. 409–412). Certainly a Superintendent of the Naval Observatory (Sec. 434), the Supervisor of the Nautical Almanac (Sec. 435), and the instructors at Annapolis could not claim exemption from court-martial for culpable inefficiency in the performance of their duties.

The Navy Department was created by the act approved April 30, 1798 (1 Stat., 553), the first section of which provides: "That there shall be an Executive Department under the denomination of the Department of the Navy,

the chief officer of which shall be called the Secretary of the Navy, &c." Up to this time the Navy had been under the control of the Secretary of War, by act of 7th of August, 1789 (1 Stat., 49). By act of February 7, 1815 (3 Stat., 202), was created "A Board of Navy Commissioners." It will be seen that this Board exercised the functions which are now performed by the chiefs of Bureaus. Concerning the members of this Board, the following opinions were rendered by the Attorney-General (2 Op., 503; 5 Op., 761).

The act of August 31, 1842, reorganizing the Navy Department (5 Stat., 579) repeals the act of 7th of February, 1815, and substitutes for the Board of Navy Commissioners, therein provided for, five Bureaus.

Thus stood the law until the passage of the "Act to reorganize the Navy Department of the United States," approved July 5, 1862 (12 Stat., 510), which increased the number of Bureaus in the Department to eight. The second section of this same act provides as follows: "And shall also appoint a chief of the Bureau of Medicine and Surgery, who shall be selected *from the list of the surgeons of the Navy.*"

The act approved March 3, 1871 (16 Stat., 535), making appropriations for the naval service, section 5, provides that "the officers of the medical corps, on the active list of the Navy, shall be as follows: Fifteen medical directors, who shall have the relative rank of captain; fifteen medical inspectors, who shall have the relative rank of commander; fifty surgeons, who shall have the relative rank of lieutenant commander or lieutenant; and each and all of the above named officers of the medical corps shall

have the pay of surgeons in the Navy as now provided; and medical directors and inspectors on duty at sea shall receive the pay of fleet surgeons." The tenth section of the same act provides, among other things: "That chiefs of Bureaus *may* be appointed from officers having the relative rank of captain in the staff corps of the Navy on the active list;" and "that any staff officer of the Navy who has *performed the duty* of chief of a Bureau of the Navy Department for a full term shall thereafter be exempt from sea duty, except in time of war."

Section 12 fixes the title, rank, and pay of the chiefs of the Bureaus.

The provisions of the Revised Statutes bearing upon the subject are as follows:

> SEC. 1368. The active list of the Medical Corps of the Navy shall consist of fifteen medical directors, fifteen medical inspectors, fifty surgeons, and one hundred assistant surgeons.
>
> SEC. 1369. All appointments in the Medical Corps shall be made by the President, by and with the advice and consent of the Senate.
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> SEC. 421. The chiefs of the several bureaus in the Department of the Navy shall be appointed by the President, by and with the advice and consent of the Senate, from the classes of officers mentioned in the next five sections respectively, or from officers having the relative rank of captain in the staff corps of the Navy, on the active list, and shall hold their offices for the term of four years.
>
> SEC. 426. The chief of the Bureau of Medicine and Surgery shall be appointed from the list of the surgeons of the Navy.
>
> SEC. 1375. A surgeon, assistant surgeon, or passed assistant surgeon may be detailed as assistant to the

Bureau of Medicine and Surgery (who shall receive the highest shore-pay of his grade).

SEC. 1471. The chiefs of the Bureau of Medicine and Surgery, Provisions and Clothing, Steam Engineering, and Construction and Repair shall have the relative rank of commodore while holding said position, and shall have, respectively, the title of Surgeon-General, Paymaster-General, Engineer-in-Chief, and Chief Constructor.

SEC. 1436. Any staff officer of the Navy who has performed the duty of a chief of a Bureau of the Navy Department for a full term shall thereafter be exempt from sea duty, except in time of war.

SEC. 1473. Officers who have been or who shall be retired from the position of chiefs of the Bureau of Medicine and Surgery, of Provisions and Clothing, of Steam Engineering, or of Construction and Repair, by reason of age or length of service, shall have the relative rank of commodore.

SEC. 1565. The pay of chiefs of Bureau in the Navy Department shall be the highest pay of the grade to which they belong, but not below that of commodore.

SEC. 1556. The commissioned officers and warrant officers on the active list of the Navy of the United States, and the petty officers, seamen, ordinary seamen, firemen, coal-heavers, and employés in the Navy shall be entitled to receive annual pay at the rates herein stated after their respective designations.

Commodores, when at sea, five thousand dollars; on shore duty, four thousand dollars; on leave or waiting orders, three thousand dollars.

SEC. 415. There shall be at the seat of Government an Executive Department, to be known as the Department of the Navy, and a Secretary of the Navy, who shall be the head thereof.

> SEC. 416. There shall be in the Department of the Navy. * * *
>
> In the Bureau of Medicine and Surgery one chief clerk, at a salary of one thousand eight hundred dollars a year.

The chiefs of Bureaus are never apppropriated for in legislative, judicial, and executive appropriation bills, but always in the appropriation for pay of the Navy, while in each of the former appears an item like the following, found in the act of June 19, 1878, 20 Stat. 178–197:

> *Be it enacted*, &c., That the following sums are appropriated for the service of the fiscal year ending June 30, 1879, for the objects hereinafter expressed, namely:
>
> *Navy Department.*—For compensation of the Secretary of the Navy, chief clerk, &c.
>
> Bureau of Medicine and Surgery: For chief clerk and nine other employés.

From this grouping of the statutes the conclusion is irresistible that a Surgeon-General, with the relative rank of commodore, with the grade of commodore for the purpose of receiving pay, retiring with the relative rank of commodore if he retires while holding said office, exempted from further sea service for having performed the duties of chief of the Bureau, appointed from the surgeons in the Navy, retaining his right of promotion as surgeon, inspector, or director, and resuming his normal duties at the end of four years, is in the Navy not merely as surgeon but also as Surgeon-General.

It will not be pretended that the assistant to the Bureau (section 1375) or a fleet surgeon (sections 1373, 1374) would

not be amenable to a court-martial for any dereliction of duty as such, and the Surgeon-General differs from them only in having a distinctive title, more exalted rank, higher grade, enhanced right of retirement, relief from future sea duty, and a more dignified method of detail or assignment. (See 10 Op., 378.)

Every one of these benefits conferred upon the Chief of the Bureau pertain to naval life; every one points to the Surgeon-General as an officer in the Navy.

There is no real distinction between this case and that of Reed, 100 U. S., 13.

In the case of Brownell Granger (16 Op., 204), Attorney-General Devens says: "It is difficult to conceive that those can be considered officers in the Navy who have no rank by which their relation to the other officers or to the men can be determined." And we think it may be said with equal force, "It is difficult to conceive how a person with such relative rank and with all the military attributes that are conferred upon a Surgeon-General is not to be considered an officer of the Navy."

It is urged that the office of Surgeon-General or Chief of the Bureau is not enumerated under Title XV, section 1362. To this there are several answers:

First. Section 5600, Rev. Stat., provides that no inference or presumption of a legislative construction is to be drawn by reason of the title under which any particular section is placed.

Second. It is equally true that under Title X ("The Department of the Navy"), section 416, which says who shall be in the Department of the Navy, does not include

the Chief in its enumeration of the officials in the Bureau of Medicine and Surgery.

Third. The chiefs of Bureaus are mentioned in two sections, 421, 426, under Title X, and in four sections, 1471, 1436, 1473, 1565, under Title XV ("The Navy").

Fourth. The Surgeon-General is not specially enumerated in section 1368, for the very obvious reason that the person who for the time being occupies that position is already among the directors, inspectors, and surgeons stated therein.

It is also urged by the applicant that his duties are not merely civil in their nature, but departmental also. To this we answer:

The appropriations for the Bureau of Medicine and Surgery, ever since the passage of the act of August 31, 1842, have invariably been placed, not in the legislative, executive, and judicial appropriation act, but in the "act making appropriations for the naval service," the same act which pays the chiefs of bureaus and all the other officers of the Navy, the professors at the Naval Academy, and the Marine Corps. (See 5 Stat., 615, 701, 791; 9 Stat., 97, 169, 266, 374, 513, 621; 10 Stat., 101, 221, 583, 676; 11 Stat., 245, 404; 12 Stat., 80, 147, 266, 561, 816; 13 Stat., 464, 82; 14 Stat., 491, 34; 15 Stat., 279, 71; 16 Stat., 532, 327; 17 Stat., 551, 150; 18 Stat., 299, 56; 19 Stat., 388, 69; 20 Stat., 288, 53; 21 Stat., 335, 86; 22 Stat., 476, 290.)

JOHN S. BLAIR,
For the Respondent.

APPENDIX.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, GENERAL TERM.

OPINION OF THE COURT.

In the matter of the application of Medical Director Philip S. Wales, U. S. Navy, for a writ of habeas corpus.

WASHINGTON, D. C., *April* 14, 1885.

Mr. JUSTICE JAMES. I have to announce the conclusion of the court in the matter of Philip S. Wales, petitioner for a writ of habeas corpus.

It appears, by the petition that the Secretary of the Navy issued to Dr. Wales the following communication and order:

WASHINGTON, D. C., *February* 28, 1885.

SIR: Transmitted herewith you will receive charges and specifications preferred against you by the Department.

A general court-martial has been ordered to convene in rooms numbered 32 and 33, at the Navy Department, Washington, D. C., at 12 o'clock noon, on Monday, the 9th proximo, at which time and place you will appear and report yourself to Rear-Admiral Edward Simpson, U. S. Navy, the presiding officer of the court, for trial. The judge-advocate will summon such witnesses as you may require for your defense.

You are hereby placed under arrest; and you will confine yourself to the limits of the city of Washington.

To the petition the Secretary of the Navy made a return, in which he states that—

Your respondent respectfully submits that the said Philip S. Wales is not now, nor was not at the time of issuing the annexed writ, in the custody or possession of, or confined or restrained of his liberty by, your respondent, other than appears by the papers marked A, B, and C, attached hereto and made a part of this return; and that the cause of such detention, if any there be, is fully shown in said exhibits.

In other words, it appears that the restraint which is characterized as a restraint of liberty in this case was exercised by this order which I have just read.

The first question that presents itself is whether the petitioner is under restraint, under that kind of restraint from which the writ of habeas corpus is intended to deliver a person? I have not at hand the book that was read to us the other day; but in the first place the question would occur, What is meant by the statement, "You are placed under arrest"? The regulations show that that is a military phrase that does not import, at all, close confinement. The order itself, however, without the assistance of the explanation, which may be drawn from the regulations, defines precisely the character of the restraint. It is that the arrest consists of *confining himself* in his movements to the city of Washington.

Authorities were cited to us to the effect that words could constitute an imprisonment, but nothing of that kind was decided by those cases. It was not there held that words constituted a confinement or deprivation of liberty. The cases were of this kind—I need not refer to them specifically—that where an officer having the power to make an actual, physical arrest, presented himself to the person and told him, "You are arrested," then these words imported that the officer took possession of him. The words constituted no arrest or deprivation of liberty, but they were simply proof of the nature of the officer's presence. His presence and demeanor were explained by the words he uttered, and his presence and demeanor had the effect to deprive the party of his liberty. Words have no effect of themselves.

Here we have an order that simply informs the party that he will confine himself to the limits of the city of Washington. As a matter of fact he could go where he pleased. His liberty is not restrained, except as he chooses to restrain himself rather than incur the consequences of disobeying this order. If he is confined to the city of Washington, he confines himself. He is told that he is to do so. That, we think, disposes of the whole question. Dr. Wales is not under restraint, except so far as he chooses to obey a military order. He can disobey it at any moment, and leave the District as freely as any person in the District can do so, under the liability, however, of answering for it. He prefers to stay rather than incur the possible penalty of disobedience in leaving the District. In short, it is shown by his own petition that he is not under that kind of restraint from which a writ of habeas corpus will deliver a person. That writ contemplates actual, physical restraint.

With this view we have not thought it proper to examine into

the validity of the order by which he alleges that he is restrained of his liberty. Where the petitioner is deprived of his liberty the court may examine, incidentally, the question whether the order, the enforcement of which restrains him, is valid; but unless we have a deprivation of liberty of the kind to which the writ of habeas corpus applies we are not at liberty to examine an order that does not deprive him of his liberty. Our power to look into that subject is incidental to the inquiry into the lawfulness of his imprisonment. If we find no imprisonment we cannot examine, and we have no power to examine, the validity of the order. For that reason we give no opinion upon that subject.

There is another very good reason why we should not do so. If by possibility the petitioner should actually be deprived of his liberty, and imprisoned under the sentence of the court-martial referred to, this court could be called upon again to look into that question; and it is not proper, as we think, for us to intimate any conclusions whatever on that subject.

Mr. JUSTICE WYLIE. I wish to say just one word. The writ of habeas corpus will only lie for the purpose of restoring to liberty a man who has been unjustly imprisoned; and I suppose the proposition cannot be denied that unless an action for false imprisonment could be maintained against the party who has done the act in question, the writ of habeas corpus will not lie in behalf of the person who is subjected to the proceeding. It is very clear, I think, that no action for false imprisonment would lie on behalf of Dr. Wales against the Secretary of the Navy for this order. If he could not maintain an action for false imprisonment, then he has not been imprisoned in such a way as to give him the benefit of a writ of habeas corpus.

On that subject I will read a few lines from Selwyn's Nisi Prius, page 915:

> False imprisonment is a restraint on the liberty of the person without lawful cause, either by confinement in prison, stocks, house, &c., or even by forcibly detaining the party in the streets against his will. For this injury an action of trespass *vi et armis* lies, usually termed an action for false imprisonment.

In a note to that, there is a reference to the opinion of Judge Baldwin, in the case of Johnson *vs.* Tomkins, reported in 1 Baldwin, 601, which, it appears to me, is directly in point in this case:

> It is not necessary to constitute false imprisonment that the person restrained of his liberty should be touched or actually ar-

rested, if he is ordered to do or not to do the thing, to move or not to move, against his own free will, if it is not left to his own option to go or stay where he pleases, and force is offered or threatened, and the means of coercion are at hand, ready to be used, or there is reasonable ground to apprehend that coercive means will be used if he does not yield. A person so threatened need not wait for its actual application. His submission to the threatened and reasonably to be apprehended force is no consent to the arrest, detention, or restraint of the freedom of his motion; he is as much imprisoned as if his person was touched, or force actually used; the imprisonment continues until he is left at his own will to go where he pleases, and must be considered as involuntary till all efforts at coercion or restraint cease, and the means of effecting it are removed.

The presence of physical force is necessary—the appearance of physical force to restrain a man of liberty is necessary—to constitute the imprisonment. A mere moral force is not sufficient for the purpose. In the present case the consequence of the violation by Dr. Wales of this order is that under the articles relating to the Navy he would lose his office. He can go if he chooses, but he would lose his office. That is the penalty. That is a moral influence. It is not the presence of physical force.

I have my doubts upon the other point, as to the power of a court-martial to try a man for negligence in the performance of his duties in connection with a Bureau of the Department, though I do not wish to commit myself upon that subject.

The CHIEF-JUSTICE. I did not sit in this case.

Mr. JUSTICE JAMES. I might have added to the opinion that in the view of the court the Secretary of the Navy would have been obliged for the first time to take possession of him, to produce his body here.

Mr. JUSTICE WYLIE. The Secretary of the Navy never had possession of him.

Mr. JUSTICE JAMES. If my brother Wylie concurs, we will dismiss the writ, overrule the demurrer, and make it final.

Mr. JUSTICE WYLIE. That will be effectual.